dressee. To explain this on the ground of actual "communication" of the acceptance makes the whole result a somewhat ridiculous legal fiction. But to explain it on the ground that enough has been done to constitute acceptance, regardless of the present knowledge of the offerer, is reasonably consistent.

To hold that mailing an offer makes the telegraph such an agent of the offerer that entrusting an acceptance to the latter amounts to "communication" to the offerer is a wide stretch of judicial fiction. It is equally so to hold that if, as in *Henthorn* v. *Fraser*, 2 Chancery 27, the offerer has delivered the offer by hand, he has so constituted the post his agent for a reply that posting the reply will amount to communication.

It is true, to be sure, that the acceptance must be sent to the offerer by some method expressly or impliedly authorized by him. This, however, is not because such sending constitutes communication necessary to completion of the contract, but because otherwise the responsibility is upon the offeree to see to it that the notification of completion of the contract duly reaches the offeror. Communication of completion is quite different from completion by communication, although the former may be necessary to the creation of an actual liability.

So, all considering, it would seem thoroughly correct to say that when a contract is completed upon the posting of an acceptance, it is because the posting amounts to a clear manifestation of acceptance put in the proper course of communication to the offerer. J. B. W.

REGULATING THE RATES ON PARTICULAR CLASSES OF SERVICES.—A North Dakota statute imposed a maximum rate upon the carriage of coal. The rate affected mainly the transportation of lignite. This particular traffic constituted only a small part of the total freight traffic of the roads involved in the suits. The rate had been declared non-confiscatory by the state court in a previous suit, (see *State* v. *N. P. Ry. Co.*, 19 N. D. 45), which decision was sustained by the United States Supreme Court in *N. P. Ry. Co.* v. *North Dakota*, 216 U. S. 579. After these decisions the rates were continued in force for several years. During this period of trial it was found that the prescribed rates were inadequate to enable the carrier to earn a substantial compensation on the traffic affected. It was even shown that a deficit was incurred on this branch of the service after it had been charged with its due portion of the common expenses of the road. The returns were, however, sufficient to pay the "out of pocket" costs of this traffic. It was *held*, that the rates in question were confiscatory; *N. P. Ry. Co.* v. *North Dakota; Minn., St. P. & S. S. M. Ry. Co.* v. *North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429. A West Virginia statute prescribed maximum rates for passenger service which after due trial were found inadequate to allow the carrier substantial compensation upon this department of the service. *Held*, that in regulating the rates of this branch of the service, the rates must permit a fair return on this service taken by itself; that the rates prescribed were confiscatory in respect to the particular carrier involved in the case; *Nor. & W. Ry. Co.* v. *Att. Gen. of W. Va.*, 236 U. S. 605, 35 Sup. Ct. 437.

The above cases raise certain interesting questions relating to the proper tests for determining whether a given rate is confiscatory. The fundamental test, stated in its most general terms, is that the rates prescribed must allow a fair return on the fair value of the property devoted to the public use, *Smyth* v. *Ames,* 169 U. S. 466. In view of the variety of forms that rate and other regulations may assume, the problem is to determine the exact meaning of this general test in each of the specific forms that such regulation takes. Broadly speaking, the regulation of rates has hitherto taken three main forms: first, regulation of an entire schedule of both freight and passenger rates; second, regulation of the rates applicable to each of these separately; third, regulation of the rates of specific commodities or services. Closely connected with direct rate regulation are those regulations of the service that indirectly affect the income of the railroads; such, for example, as a regulation prescribing certain changes in schedules to enable better connections with other lines. In trying to discover the legal test of confiscation, all these various classes of cases may be resorted to. The *North Dakota* case, however, concerns itself with a rate affecting a particular commodity; the *West Virginia* case with a rate affecting a particular department of the service. Insofar as there have been adjudications on these specific points in the past, such cases will have to be given the greater weight, although some weight may be given to cases involving other classes of rate regulations insofar as there are intimations of principles applicable to these cases.

The first question that arises in considering the instant cases is whether they are in accord with former adjudications. When the *North Dakota* case was before the state court (see 26 N. D. 438) the rates were held not to be confiscatory because they allowed sufficient returns to pay the purely out-of-pocket costs incurred in moving the traffic. Another reason given in support of this conclusion, and one that touches the problem in hand more closely, was that it had not been shown that the effect of the particular rates would be to reduce the net returns on the entire intra-state traffic below the point of fair return. The effect of the particular rates upon the entire intra-state business, therefore, was the test in the mind of the state court. This is the proper test where an entire rate schedule affecting both freight and passenger service is involved; *Smyth* v. *Ames,* 169 U. S. 466; *Chi., M. Etc. Ry Co.* v. *Tompkins,* 176 U. S. 167; *Minn. Rate Cases,* 230 U. S. 352. Although there is no direct statement that this test is of universal application, the emphasis placed upon it in all of these cases made it not at all unnatural to apply it to all rate regulations by the states. This, however, is not by itself a sufficient reason, and recourse will have to be had to those cases in which specific rates were involved. One of the earliest cases in which this question arose was that of *Minn. & St. L. R. R. Co.* v. *Minnesota,* 186 U. S. 257, which involved a reduction on certain coal rates. It had been argued that if the same rate of reduction were applied generally, the roads would be unable to make operating expenses. In this connection the court said, "Notwithstanding the evidence of the defendant * * * it may well be that the existing rates

upon other merchandise, which are not disturbed by the commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing on coal in carload lots. We do not think it beyond the power of the state commission to reduce the freight upon a particular commodity, provided the companies are able to earn a fair profit upon their entire business." See the same case in 80 Minn. 191. In another case involving reductions on certain classes of freights, it was held that the proofs failed to establish that the returns from the regulated traffic would be insufficient to pay for the traffic. The court, in explaining its stand, however, said, "There was no proof of the value of the complainant's property within the state of Indiana, or of the returns it received from its entire intra-state traffic. * * * For all that appears, the Vandalia company might enjoy, notwithstanding the enforcement of the rates in question, ample revenues from its intra-state operations to give it a fair return both as to all its lines within the state, and also as to that portion to which the order applies." *Wood* v. *Vandalia R. R. Co.*, 231 U. S. 1. A similar implication is found in the case of the *Southern Pac. Co.* v. *Campbell,* 230 U. S. 537, which involved a reduction on certain freight traffic, where the only objection was that the bill failed to aver facts relative to expenses incurred in connection with intra-state as distinguished from interstate business. In *Atlantic Coast Line* v. *Florida,* 203 U. S. 257, an order reducing rates on phosphates was involved. In affirming a decision of the state court upholding the order, the court says, "It is enough for the present to hold that there is in the record nothing from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, *or the effects which the rates established by the Commission will have upon income.*" In *Willcox* v. *Con. Gas. Co.*, 212 U. S. 19, the following language is used by the court: "We cannot see from the whole evidence that the price fixed for gas supplied to the city by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied, as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return, it is not important that with relation to some customers, the price is not enough." Looking to the reasons of the court in these cases for discovering their real position, there would seem to have been adequate reasons for the state court in the *North Dakota* case to employ the test it used in determining the question of confiscation before it. This view receives further strength from a consideration of those cases involving regulatory orders compelling the performance of admittedly unremunerative services; see *At. Coast Line* v. *N. C. Corp. Comm.*, 206 U. S. 1; *C. & O. Ry. Co.* v. *Pub. Ser. Comm. of W. Va.*, 83 S. E. 286; 13 MICH. LAW REV. 407. In the former of these last cited cases an attempt was made to distinguish such an order from one affecting rates directly. Unless such other forms of regulation can be made confiscatory without being illegal, there would seem to exist no sound reason for such a distinction. Such, then, was the state of the law when the present cases came before the court. In deciding that the lignite traffic must pay its own way, therefore, it would appear that a new rule is formulated for

this type of cases. It may be, as the court in the *North Dakota* case says, that these cases are distinguishable on their facts. No logic, however, can make the decision in that case consistent with the result that would follow from the reasons given in previous cases involving similar situations.

The *West Virginia* case, involving passenger fares, can be dismissed with briefer comment. The case of *Chi. & G. T. Ry. Co.* v. *Wellman*, 143 U. S. 339, involved a regulation of passenger rates. Although there is no explicit statement of the test that the court would have used, the test that seems implicit in the arguments is that of the effect of the regulation upon the entire intra-state income. In another case involving the validity of a passenger rate schedule, it was held that in order to show that such rates were confiscatory it would have to be shown both that there was a failure to realize a fair return on the entire intra-state business, and that such failure was due to the particular regulation that was being attacked. *L. & N. R. R. Co.* v. *Ala. R. R. Comm.*, 208 Fed. 35. This certainly implies that the effect upon the entire intra-state income is a matter of paramount importance in such cases. It is true that the Pennsylvania court had held that this department should be separately considered; *Penn. R. R. Co.* v. *Phila. County*, 220 Pa. St. 100. The dissenting opinion in this case, however, interprets a long line of decisions of the United States Supreme Court as not countenancing such a division. Up to the time of the instant case, therefore, there had been no definite pronouncement on this particular question in the United States Supreme Court. The result in this case, therefore, cannot be said to be a reversal of position so much as it is an authoritative pronouncement on a hitherto doubtful question.

As a result of these cases, therefore, states will in the future have to treat the passenger and freight departments separately in their rate regulations. Furthermore, in certain cases, specific commodity traffic will have to be dealt with in like manner. The extent to which the courts will carry the process in this latter type of cases is a new problem that will have to be determined in the future. In certain cases, therefore, certain kinds of traffic will have to pay for themselves. That at once raises the question as to what that means. A quotation from the court in the *North Dakota* case will make this plain. "We entertain no doubt that, in determining the cost of transportation of a particular commodity, all outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs' or 'actual' expenses, and other outlays which are none the less actually made because they are applicable to all traffic instead of being exclusively incurred in the traffic in question." Each type of traffic must, therefore, bear its proportion of the common expenses incurred for all traffic in general. In addition to this, there is strong intimation in the case that each type of traffic shall be allowed to earn some net profits, except in exceptional cases. What these exceptional circumstances are is not indicated.

Many questions concerning the economic analysis of the railroad problem implied in these recent decisions might be discussed. In so far as this can be gleaned from the discussion of the cases, it is apparent that the court

aimed to prevent any system of rates whereby one group of the public should profit at the expense of another part of the public; as is said in the *North Dakota* case: "Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. This would be but arbitrary action." Another question, which however will not be answered, is whether such a procedure as was followed in these cases, is defensible on a cost theory of rates, on a value of service theory of rates, or on a theory of rates combining both of these factors? Furthermore, to what extent does it take sufficient account of the interrelation between the specific rates in an entire rate schedule and such entire schedule? The courts will no doubt constantly run into questions of this type in their efforts to define the exact limits of these doctrines, especially that announced in the *North Dakota* case. Space forbids going into an historical discussion of the development of the rate question suggested by these recent cases. In conclusion it may be merely stated that it is an attempt to determine the meaning of the general test for confiscation in respect to the various details of the general rate problem. Further developments in this direction are inevitable. H. R.

AUTHORITY OF PRESIDENT TO WITHDRAW LANDS FROM ENTRY.—Whether the act of the President in withdrawing lands from entry is constitutional has been for some years a question upon which authorities on Constitutional Law have been at variance, and regarding which the different administrations have not wholly agreed. This dispute has been recently settled by the Supreme Court in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 35 Sup. Ct. 309, where the majority of that court upheld the order of President Taft of September 27, 1909, withdrawing from entry over 3,000,000 acres of oil land in California and Wyoming. The dissenting opinion by Mr. Justice DAY (with whom concurred Mr. Justice MCKENNA, and Mr. Justice VAN DEVANTER), certainly detracts from the weight of this decision.

The prevailing opinion, admitting that Congress has exclusive control of public lands, proceeds upon the theory that by long acquiescence it has impliedly delegated to the President the power to make withdrawal orders, and that until such implied authority is withdrawn or the act of the President repudiated, the orders thus promulgated have the force and effect of law. But conceding that such long acquiescence would be a just ground for the implication of authority, has there been this tacit consent of Congress? As is pointed out in the dissent, the cases in which the executive power to withdraw lands from entry has been upheld by the courts, other than those under express congressional authority, may be classified under one of two heads: (a) in furtherance of some purpose formerly declared by Congress as one for which the public lands might be used; (b) where the acts of Congress regarding the land are so conflicting as to make it doubtful what the policy was, and the withdrawal is for the purpose of awaiting action by Congress to declare the policy. The case of *Grisar* v. *McDowell*, 6 Wall. 363, much relied upon as in support of the prevailing opinion, will on close analysis be seen to range itself under the first of these two heads. The cases involving